Supreme Court, U.S.
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97 1303 FEB 4 1998

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CHARLES JEFFREY ROSS,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Ross
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

41 pp

QUESTIONS PRESENTED

Petitioner Charles Ross was convicted of possession with intent to deliver cocaine based on a search by police. The questions presented are:

QUESTION 1: ARE POLICE REQUIRED TO GET A WARRANT TO CONDUCT A PLANNED SEARCH WHEN IT IS FEASIBLE TO DO SO WELL IN ADVANCE OF THE SEARCH?

QUESTION 2: DO CASES LIKE *COOLIDGE V NEW HAMPSHIRE*, 403 U.S. 443 (1971) THAT FIND A WARRANT REQUIREMENT FOR NON-EXIGENT AUTO SEARCHES CONTINUE TO HAVE VALIDITY AFTER *WHREN V UNITED STATES*, 517 U.S. ___ (1997)?

QUESTION 3: DOES THE RULE OF *UNITED STATES V PLACE*, 462 U.S. 696 (1983) PROHIBITING EXCESSIVE DETENTION FOR PURPOSES OF INVESTIGATION CONTINUE TO APPLY EVEN IN AN AUTOMOBILE SITUATION, IN LIGHT OF *WHREN*, AND *UNITED STATES V SHARPE*, 470 U.S. 675 (1985)?

QUESTION 4: IS A DETENTION OF OVER 90 MINUTES TO AWAIT A SEARCH UNREASONABLE WHERE POLICE HAD PLANNED THE STOP AND SEARCH SEVERAL HOURS EARLIER?

QUESTION 5: WHERE STATE LAW PROVIDES FOR DIFFERENT CRIMES FOR DIFFERENT AMOUNTS OF DRUGS, MAY A COURT CONSTITUTIONALLY REFUSE A DEFENSE REQUEST TO ALLOW THE JURY TO FIND A SMALLER AMOUNT THAN THE PROSECUTOR HAS CHARGED?

QUESTION 6: WHERE THE EVIDENCE SHOWED A VERY VALUABLE CACHE OF DRUGS, WAS IT CONSTITUTIONAL TO EXCLUDE EVIDENCE OF PETITIONER'S POVERTY, WHERE THE DEFENSE WAS THAT THE DRUGS WERE PLANTED?

QUESTION 7: DID THE COURT DENY DUE PROCESS BY REFUSING TO INVESTIGATE EVIDENCE THAT ONE JUROR MAY HAVE BEEN UNDULY PRESSURED TO CONVICT, WHERE THE INVESTIGATION WAS REQUESTED WHILE THE JURORS WERE STILL PRESENT?

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PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

CHARLES ROSS, Petitioner by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the Michigan Court of Appeals issued December 20, 1996.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals of December 20, 1996 affirming the conviction and the order of the Michigan Supreme Court of November 7, 1997 denying leave to appeal are attached in the Appendix.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Wayne County, Michigan, Circuit Court. The opinion of the Michigan Court of Appeals was issued December 20, 1996. The final judgment of the Michigan Supreme Court was issued November 7, 1997. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Charles Ross was convicted in Wayne County, Michigan Circuit Court of possession with intent to deliver over 650 grams of cocaine contrary to M.C.L. 333.7401. On April 26, 1995, Judge Jeffrey Collins sentenced Petitioner to prison for life without possibility of parole.

Petitioner filed a motion to suppress evidence seized as a result of a warrantless search of his van and lengthy pre-search detention. An evidentiary hearing was conducted December 2, 1994, with attorney argument on February 17, 1995. On March 10, 1995 Judge Margie Braxton denied the motion.

Livonia police officer Robert Stevenson testified he received an anonymous tip by telephone that Petitioner was going to New York to pick up cocaine. The tip included a description of his van, when he would be returning to Michigan, and the motel where Ross would be staying on the east coast. (T Dec 2, 23-30).

On the afternoon of September 11, 1994, Stevenson met with other officers to plan to meet Petitioner and his van. (T Dec 2, 24-25). The officers deployed around 8 p.m. on September 11 in Taylor, Michigan. Petitioner was stopped at 12:38 a.m. on September 12, and was detained. (T Dec 2, 6). Petitioner had been speeding, and had a broken taillight. (T II, 104-106). About an hour and 40 minutes later a dog was put inside the van to sniff for drugs. The dog alerted, and approximately 1 1/2 kilos of cocaine were found hidden under the driver's seat, not in plain view.(T Dec 2, 20-22). Off. Donnelly testified it would be possible to be in the van and not be aware of the cocaine. (T II, 137).

There was no search warrant at the time of the detention, but after Petitioner was stopped, Sgt. Stevenson went to get a warrant. (T II, 64).

Petitioner testified that although he lived miles from Livonia, he had a long-standing bad relationship with the Livonia police that caused them to seek him out and trouble him. (T III, 85-86). He went to New York to spend the weekend with a young woman. (T III, 118-123). He did not know the 2 packages of cocaine were in

his van. He did not know who put them there. (T III, 104).

The trial court ruled that Petitioner could not present to the jury evidence of his inability to post bond. (T II, 189-192; T III, 4-9).

Petitioner's attorney objected to the jury instructions in many respects, including refusing to instruct on a lesser included offense. (T III, 124-139).

When the verdict was issued, defense counsel noted that one of the jurors was upset and crying. The jurors were sent to the jury room, and counsel asked the court to inquire as to whether any undue influence had been brought to bear on the juror. The judge refused, and sent the jurors home. (T IV, 30-34).

REASONS FOR GRANTING THE WRIT

QUESTION 1: ARE POLICE REQUIRED TO GET A WARRANT TO CONDUCT A PLANNED SEARCH WHEN IT IS FEASIBLE TO DO SO WELL IN ADVANCE OF THE SEARCH?

QUESTION 2: DO CASES LIKE *COOLIDGE V NEW HAMPSHIRE*, 403 U.S. 443 (1971) THAT FIND A WARRANT REQUIREMENT FOR NON-EXIGENT AUTO SEARCHES CONTINUE TO HAVE VALIDITY AFTER *WHREN V UNITED STATES*, 517 U.S. ___ (1997)?

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QUESTION 4: IS A DETENTION OF OVER 90 MINUTES TO AWAIT A SEARCH UNREASONABLE WHERE POLICE HAD PLANNED THE STOP AND SEARCH SEVERAL HOURS EARLIER?

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject

only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390; 98 S.Ct. 2408; 57 L.Ed.2d 290 (1978); U.S. Const., Amend. IV.

One of those is the "automobile exception." This exception has been the subject of many Supreme Court decisions over the years, and in all likelihood will continue to be, in light of the importance of autos in our society.

Petitioner submits that there are in fact two lines of cases covering the issue of a warrant requirement for searches of automobiles. The most commonly applied rule involves exigent situations. This would include when an officer gets probable cause regarding an auto he is following, or when an officer stops an auto and probable cause develops during the encounter. In these cases, the contact or observation of the auto precedes or is simultaneous with the acquisition of the probable cause. See, e.g. *United States v. Ross*, 456 U.S. 798; 102 S.Ct. 2157; 72 L.Ed.2d 572 (1982); *United States v. Sharpe*, 470 U.S. 675; 105 S.Ct. 1568; 84 L.Ed.2d 605 (1985). Cases in this line give rise to the concept of the "automobile exception" to the Fourth Amendment warrant requirement.

However, there is a second line of cases that cover the situation where the officer first gets the probable cause, and then goes to find or seize the vehicle to which the probable cause pertains. Cases in this line require a warrant for the search in the absence of exigent

circumstances. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443; 91 S.Ct. 2022; 29 L.Ed.2d 564 (1971):

> "Where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant imposes no inconvenience whatsoever, at least none which is constitutionally cognizable..." 29 L.Ed.2d at 585.

> "Since the police knew of the presence of the automobile and planned all along to seize it, there was no 'exigent circumstance' to justify their failure to obtain a warrant." 29 L.Ed.2d at 590.

See also *People v. Esters*, 417 Mich. 34, 51 (1982); *United States v. Wall*, 807 F. Supp. 1271 (E.D. Mich. 1992).

As this Court held in *New York v. Class*, 475 U.S. 106; 106 S.Ct. 960; 89 L.Ed.2d 81 (1986): "A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."

In this case, a Michigan police officer got an anonymous tip that Petitioner was going to the New York area and returning with cocaine. The officer checked out several facts stated by the caller and verified them as

true, including Petitioner's presence at a motel in New Jersey. He met with several other officers in the afternoon. A plan was made to set up surveillance beginning around 8 p.m. on a road that Petitioner would be likely to travel on. Petitioner was pulled over in his van about 12:30 a.m. after traveling 40 mph in a 25 mph zone, and having a burnt out taillight. He was detained at the scene.

After a hour and 40 minutes, an officer with a canine arrived and allowed the dog into the van. The dog alerted an officer and cocaine was found hidden under the driver's seat, outside of plain view. Petitioner was then arrested.

Since the police knew where they intended to search (Mr. Ross's vehicle), and what they intended to search for (cocaine), and the probable cause for the search (the informant's verified information) hours before the search, there were no exigent circumstances.

The entry into a vehicle, even when for the purpose of a dog sniff, constitutes a search. *United States v. Pierre*, 932 F.2d 377, 383 (5th Cir. 1991); *United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993), even though a dog sniff of the outside of packages is not a search, *United States v. Place*, 462 U.S. 696; 103 S.Ct. 2637; 77 L.Ed.2d 110, 121 (1983). As the Court explained in *Soldal v. Cook County*, 506 U.S. 56; 113 S.Ct. 538 (1992):

> "In *Place*, although we found that subjecting luggage to a 'dog sniff' did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest, taking custody of Place's suitcase was deemed an unlawful seizure, for it unreasonably infringed 'the suspect's possessory interest in his luggage.'"

Under this authority, both Petitioner Ross and his van plainly were seized.

The prosecution has the burden of proving exigent circumstances to justify the absence of a warrant for a search or seizure. *United States v. Patino*, 830 F.2d 1413, 1415 (7th Cir. 1987); *United States v. Tarazon*, 989 F.2d 1045, 1049 (9th Cir. 1993). This burden they did not meet. As the Court held in *United States v. Tarazon*, at 1049:

> "The existence of probable cause does not eliminate the need for a warrant absent exigent circumstances...The government bears the burden of showing the existence of exigent circumstances by particularized evidence... Furthermore, the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore the government must show that a warrant could not have been obtained in time."

In *United States v. Patino*, supra, at 1416, the Court held that we must look at when the police had a right to get a warrant. In this case, it was hours before the stop and search.

The Court may not find exigent circumstances excusing a warrant when it is the police who created the exigent circumstances by failing to get a warrant in a timely fashion. *United States v. Patino*, supra; *United States v. Richard*, 994 F.2d 244, 248-250 (5th Cir. 1993); *United States v. Ogbuh*, 982 F.2d 1000, 1004 (6th Cir. 1993).

In *United States v. Radka*, 904 F.2d 357 (6th Cir. 1990), the Court noted that the agents had time to get a warrant before they took their actions that arguably created exigent circumstances. The Court held that "Inadequate law enforcement preparation does not justify warrantless entry."

"The government must show that a warrant could not have been obtained in time," *United States v. Tarazon*, supra, and this they did not do.

The Courts have long upheld the issuance of anticipatory warrants, that is, a warrant to search something that has not yet arrived. *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978); *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989); *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States v. Pieri*, 21 F.3d 811 (8th Cir. 1994). The police knew exactly which vehicle they intended to search, knew its description, whom it

was registered to, the license plate number. A warrant could easily have been issued, if they had chosen to get one.

This Court should therefore find that the police action in premeditating a seizure and detention of Mr. Ross and his vehicle, and a search of the vehicle, where there was ample time to get a warrant, made the warrantless actions unlawful, requiring suppression. U.S. Const., Amend. IV.

However, there is a new development in the law, the holding in *Whren v. United States*, 517 U.S. ___; 116 S.Ct. 1769 (1997). The Supreme Court found that where there was probable cause to believe there was a violation of the traffic code, the stop was reasonable under the Fourth Amendment. At first glance, this might be seen as making irrelevant the motivation to stop Petitioner based on pre-existing probable cause, and that is what the Michigan Court of Appeals found.

We submit that even if *Whren* applies to validate the stop of the vehicle, the officer in *Whren* saw drugs in plain view. No search occurred in *Whren* until the drugs were seen and an arrest was made. In this case, unlike *Whren*, we have to deal with the legality of a search that was not incident to arrest.

We further submit that *New York v. Belton*, 453 U.S. 454; 101 S.Ct. 2860; 69 L.Ed.2d 768 (1981), continues to control regarding search incident to arrest. The Court said:

> "[W]e hold that, when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

In this case, as a factual matter, there was not any arrest until after the search. Further, there could not lawfully have been one anyway. Under Michigan law, speeding is a civil infraction. M.C.L. 257.627. Under Michigan law, a car need have only one taillight working, M.C.L. 257.686, therefore, Petitioner committed no taillight infraction. When there is an equipment violation pertaining to lights, it is only a civil infraction. M.C.L. 257.686. Civil infractions are not criminal offenses, and arrests for civil infractions are not authorized. M.C.L. 257.907, M.C.L. 764.1, M.C.L. 764.15.

Tickets for these civil infractions could have been issued in minutes; Ross was detained over 1 1/2 hours before contraband was found. Ross was clearly detained beyond the amount of time needed to issue civil infraction tickets against him. When state law provides for a civil infraction offense where arrest is not authorized, the detainee shall be detained only for the period needed to issue the ticket and determine that the driver is properly licensed. *United States v. Mesa*, 62 F.3d

159, 162 (6th Cir. 1995); *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988).

Instead of issuing a ticket immediately, officers detained Petitioner for over an hour and a half, then proceeded to conduct a dog sniff both inside and outside of the vehicle. These actions demonstrated an intent to detain Petitioner Ross for a longer period of time than that strictly necessary to process the civil infraction tickets and determine his license status. "The actions taken by the police following a justified traffic stop must be reasonably related in scope to the circumstances which justified the stop in the first place." *United States v. Rodriguez-Morales*, 929 F.2d 780, 784 (1st Cir. 1991).

The justification for a vehicle stop defines how long a reasonable detention may be. To the extent that *Whren* and a civil traffic violation justify a stop of a vehicle, that justifying cause circumscribes the length of a reasonable detention.

In *United States v. Place*, supra, the 90 minute detention of the property for purposes of a dog sniff was held to be an unreasonable seizure, and the fruits were suppressed. That is approximately the length of detention in this case.

Even though the state court noted that the Supreme Court approved a detention of a driver for 20 minutes in *United States v. Sharpe*, 470 U.S. 675; 105 S.Ct. 1568; 84 L.Ed.2d 605 (1985), we submit that *Sharpe* did not overrule *Place*. Indeed, *Sharpe* draws the very

distinction that Petitioner seeks to have this Court draw in this case. Distinguishing *Place*, the *Sharpe* court stated:

> "We decided that an investigative seizure of personal property could be justified under the *Terry* doctrine, but that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." 462 U.S., at 709. However, **the rationale underlying that conclusion was premised on the fact that the police knew of respondent's arrival time for several hours beforehand, and the Court assumed that the police could have arranged for a trained narcotics dog in advance and thus avoided the necessity of holding respondent's luggage for 90 minutes.** "[I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." [emphasis added]

And, of course, the 20 minutes in *Sharpe* is much less than the amount of time in this case and in *Place*.

In *Mincey v. Arizona*, supra, the Court held:

> "We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search...The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

This Court should grant certiorari to determine the extent to which *United States v. Place* has continuing validity after *United States v. Sharpe*, and the extent to which *Coolidge v. New Hampshire* has continuing validity after *Whren v. United States*. This Court should hold that when officers plan to conduct a search several hours in the future, there is enough time to get a warrant, and that the automobile exception does not apply to a pre-planned, non-exigent search.

QUESTION 5: WHERE STATE LAW PROVIDES FOR DIFFERENT CRIMES FOR DIFFERENT AMOUNTS OF DRUGS, MAY A COURT CONSTITUTIONALLY REFUSE A DEFENSE REQUEST TO ALLOW THE JURY TO FIND A SMALLER AMOUNT THAN THE PROSECUTOR HAS CHARGED?

The due process clause of the United States Constitution requires that instructions regarding a lesser offense be given when supported by the evidence. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1980); *Keeble v. United States*, 412 U.S. 205; 93 S.Ct. 1993; 36 L.Ed. 2d 844 (1973); U.S. Const., Amend. XIV.

The charge was possession with intent to deliver (PWID) over 650 grams of cocaine. Michigan law recognizes lesser offenses of PWID over 225 grams, PWID over 50 grams, and simple PWID. M.C.L. 333.7401. The offenses constitute different crimes under Michigan law. A motion to instruct on PWID over 225 was requested, but the court denied it.

A chemist did give testimony that the total amount of the 2 packages was over 650 grams. However, a rational jury could have found that Petitioner knew of one package, but not the other, which would result in an amount under 650 grams.

More importantly, the jury was not required to accept the judgment of the chemist as to weight. They saw the items themselves, and had the legal right to

decide the weight was less than the chemist said. *People v. Chamblis*, 395 Mich. 408 (1975).

To hold in this case as a matter of law that the amount was over 650 grams would be to take from the jury an important question of fact, and would amount to an unlawful directed verdict. *Morissette v. United States*, 342 U.S. 346; 72 S.Ct. 240; 96 L.Ed. 288 (1952); *Rose v. Clark*, 478 U.S. 570; 106 S.Ct. 3101; 92 L.Ed.2d 460 (1986); *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168 (6th Cir. 1986).

QUESTION 6: WHERE THE EVIDENCE SHOWED A VERY VALUABLE CACHE OF DRUGS, WAS IT CONSTITUTIONAL TO EXCLUDE EVIDENCE OF A PETITIONER'S POVERTY, WHERE THE DEFENSE WAS THAT THE DRUGS WERE PLANTED?

Petitioner testified that he did not know of the cocaine in the van, and that it must have been placed there by someone else, perhaps an enemy of Petitioner's, perhaps the one who phoned in the anonymous tip. If believed, that would be a complete defense, as under Michigan law possession of drugs must be knowing possession to be criminal. *People v. Betancourt*, 120 Mich. App. 58 (1982); M.C.L. 333.7401(1).

An officer testified that the value of the cocaine was about $28,000 per kilo, and about 1.5 kilos were found.

The defense wished to show that Petitioner was so poor he could not even pay his bond. The bond was $50,000, which could be raised by paying $5,000, and putting up collateral (such as a home) for the rest. A rational jury could conclude that a person unable to raise such a small amount of money was unlikely to be tied to such major drug dealing.

The inference would be especially compelling in light of the fact that at the time, the province of Quebec, not far from Michigan, was refusing to extradite defendants to face Michigan's harsh drug penalties. In *USA v. Jamieson*, Quebec Court of Appeals (August 25, 1994), the Court refused to extradite Daniel Jamieson to Michigan to face the mandatory 20 to 30 year sentence for a 225-649 gram case. The Court held that the penalties under the Michigan drug laws violate "the principles of fundamental justice within the meaning of section 7 of the Canadian Charter of Rights and Freedoms" and were "so excessive as to outrage standards of decency." This circumstance would make getting out of jail especially attractive to one facing life in prison without parole.

Drug dealers and drug dealing organizations dealing in this kind of quantity would have to have significant financial resources. If the jury had known that for $5000 and his house Petitioner could have evaded life in prison without possibility of parole, the jury might well have concluded that someone this poor was not involved with this quantity of cocaine, despite the suspicious

circumstance of it being found in his van. However, the jury was not permitted to draw that inference, as the evidence was hidden from them.

If Petitioner had paid a million dollars to get out on bond, we can be sure the prosecution would have been allowed to use this access to wealth as part of their proof. See, e.g., *United States v. Robaina*, 39 F.3d 858 (8th Cir. 1994); *United States v. Harris*, 20 F.3d 445 (11th Cir. 1994). If wealth is relevant to guilt or innocence of drug trafficking, so also is poverty. To deny the defense the opportunity to introduce evidence routinely admitted on behalf of the prosecution denies due process of law. *Wardius v. Oregon*, 412 U.S. 470; 93 S.Ct. 2208; 37 L.Ed.2d 82 (1973); U.S. Const., Amend. XIV.

In *Chambers v. Mississippi*, 410 U.S. 284, 302; 93 S.Ct. 1038; 35 L.Ed.2d 297 (1973), the Court held that in any criminal case the defendant has a due process right to introduce evidence that the actions the prosecution claims were committed by him were in fact committed by another person. In *Rock v. Arkansas*, 483 U.S. 44; 107 S.Ct. 2704; 97 L.Ed.2d 37, 48-49 (1987), the Court held that a defendant has a right to present a defense, and it is unconstitutional to exclude material portions of a witness's testimony. This Court should grant certiorari to uphold these principles.

QUESTION 7: DID THE COURT DENY DUE PROCESS BY REFUSING TO INVESTIGATE EVIDENCE THAT ONE JUROR MAY HAVE BEEN UNDULY PRESSURED TO CONVICT, WHERE THE INVESTIGATION WAS REQUESTED WHILE THE JURORS WERE STILL PRESENT?

During the announcing of the verdict, defense counsel observed that a juror (Ms. Rugirello) was crying and upset. The jury was dismissed to the jury room. Before they were released, defense counsel asked the court to inquire of the juror as to whether any undue pressure had been brought to bear on her. The court refused.

Inherent in the constitutional right to a jury trial is that a juror is to vote according to his or her own conscience and view of the evidence. *Taylor v. Louisiana*, 419 U.S. 522; 95 S.Ct. 692; 42 L.Ed.2d 690 (1975); *Tanner v. United States*, 483 U.S. 107; 107 S.Ct. 2739; 97 L.Ed.2d 90 (1987); ABA Minimum Standards for Criminal Justice 5.4. A system where a juror can be browbeaten into accepting the verdict of others against her will would not comport with due process of law. U.S. Const., Amend. XIV.

While the jury was still present, it would have taken only a moment to determine whether the apparent problem with the verdict was real or not. If the juror confirmed that her will had been overcome by pressure or

threats, the court could have taken remedial action. This court decided it was more important to avoid a new trial rather than find out the facts.

While there may be cause for disallowing jurors to come back days or years later to impeach a verdict, *McDonald v. Pless*, 238 U.S. 264; 35 S.Ct. 783; 59 L.Ed. 1300 (1915), where the jury is still in the jury room, the rationale for such rules disappears.

The state court finding that the issue was not preserved is incomprehensible.

We submit this Court should grant certiorari to uphold the principle that insuring the juror's verdict is indeed the juror's own verdict is essential to due process of law.

CONCLUSION

Petitioner Charles Ross respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Ross
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

Dated: February 2, 1998

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED December 20, 1996
Plaintiff-Appellee,	
v	
CHARLES JEFFREY ROSS,	No. 186835 LC No. 94-010665
Defendant-Appellant.	

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver over 650 grams cocaine, MCL 333.7401(2)(a)(i); MSA 14.15 (7401)(2)(a)(i). Defendant was sentenced to life in prison without the possibiiity of parole. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the introduction into evidence of the cocaine found in his van, because the police had no probable cause and no

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* Circuit judge, sitting on the Court of Appeals by assignment.

warrant to stop and to search the van, and because he was detained for an impermissibly long time. We disagree.

Defendant contends that the police officers, in violation of US Const, Am IV, and Const 1963, art 1 § 11, did not have probable cause to stop his van. Law enforcement officers may make constitutionally proper investigative stops when the totality of the circumstances as understood by the officers yields a particular suspicion that the individual being investigated has been, is, or is about to be, engaged in criminal activity. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Reasonable cause necessary to stop a motor vehicle need not arise from a police officer's personal observation, but may also be supplied by a citizen-informant if the information carries enough indicia of reliability to provide the officer with a reasonable suspicion that criminal activity is afoot. *People v Armendarez*, 188 Mich App 61, 67; 468 NW2d 893 (1991). We examine three factors to determine whether an informant's tip carried enough indicia of reliability to supply the basis for reasonable cause to stop a defendant's vehicle: (1) the reliability of the informant; (2) the nature of the information given the police; and (3) the reasonableness of the suspicion in light of these factors. Id.

We hold that the informant's tip in this case carried sufficient indicia of reliability to provide the officers with reasonable cause to stop defendant's vehicle. The informant was familiar with defendant's past, telling the officer she spoke with about past police investigations of defendant's home. The police officer was able to verify that defendant had gone to New York, as the informant

said he had. The officer's suspicion of defendant was reasonable in light of the fact that defendant had been under surveillance by police for suspected drug activity. Because the police knew, through a reliable tip, that defendant had been engaging in criminal activity, i.e, buying and transporting cocaine, they properly stopped his van.

Assuming, arguendo, that the informant's tip did not provide reasonable cause to stop defendant's vehicle, we find the stop was otherwise valid because defendant was speeding and his vehicle had a non-working taillight when he was stopped. The decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred, regardless of the actual motivations of the individual officers involved. *Whren v United States*, 517 US ___; 116 S Ct 1769; 135 L Ed 2d 89, 95 (1996). See also *Ohio v Robinette*, ___ US ___; US Lexis 6971, opinion issued November 18, 1996.

Defendant asserts that he was held for an impermissibly long time before the search warrant for his van finally arrived at the site where his van had been stopped. Although it is true, as defendant contends, that the United States Supreme Court ruled in *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983), that a detention of ninety minutes was an unreasonable seizure under the Fourth Amendment, Place involved different facts. The defendant in Place was an airline passenger, not a driver with the inherent mobility that a motor vehicle confers. Further, no warrant was ever sought for the contested search in Place. In the instant case, the police officers had started the process necessary

to obtain a search warrant before defendant entered Michigan.

Moreover, in *United States v Sharpe*, 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985), the United States Supreme Court ruled that a twenty-minute detention was proper under the Fourth Amendment where it allowed a law enforcement officer to pursue his investigation in a diligent and reasonable manner that was likely to confirm or dispel his suspicions as quickly as possible. *Sharpe, supra* at 686-687. The *Sharpe* Court also declined to place a rigid time limit on investigatory stops, preferring to allow law enforcement officers to take the time reasonably needed to effectuate their purposes. *Sharpe*, supra at 685, In defendant's case, the lengthy detention was necessary to effectuate the purpose of the stop, which was to give the police officer preparing the request for a warrant time to add the information that defendant had been stopped while driving his van, as the informant had said he would be. The detention was thus reasonable.

Defendant also contends that if the police officers had probable cause to search his van, they should have had a search warrant ready and waiting when he arrived in Michigan. We disagree.

Indeed, a police dog gave positive indications of the presence of narcotics in the van after it had been stopped. Moreover, we hold that suppression was not required by the police officers' violation of MCL 780.655; MSA 28.1259(5). Defendant was allowed to see the search warrant within a few days of his arrest, ultimately received a copy, and has not demonstrated any harm or

prejudice as a result of the failure of the oflicers to give him a copy of the warrant "forthwith." *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991). On the basis of all of the above, we cannot say that the trial court's failure to grant defendant's suppression motion was clearly erroneous. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

Defendant further argues that the trial court abused its discretion in admitting the cocaine into evidence, when the cocaine had been repackaged into larger, looser packaging than it had been in when found in his van. We disagree.

An adequate foundation for the admission of tangible evidence requires that the prosecution show that the object offered is the object involved in the incident and that the condition of the object is substantially unchanged. *People v Prast (On Rehearing*, 114 Mich App 469, 490; 319 NW2d 627 (1982). When determining if the object should be admitted, the trial court should consider he nature of the article, the, circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it. Id.

The prosecution's proof regarding the repackaged cocaine fulfilled all the requirements of *Prast*. The same police officer who found the cocaine was present when it was repackaged, and was able to testify that the cocaine presented at trial was the same cocaine that he had found. The officer in charge of defendant's case and the Michigan State Police chemist who tested the cocaine both testified that it was necessary to remove the cocaine from its original packaging in order to accurately test and

weigh it. No evidence of tampering, error, or chemical alteration of the cocaine was brought out during cross-examination of the chemist. Looking at all the facts, we hold that the trial court did not abuse its discretion in admitting the repackaged cocaine into evidence. *People v McElhaney*, 215 Mich App 269, 280; 545NW2d 18 (1996).

Defendant next argues that the trial court erred in failing to instruct the jury as to lesser included offenses of possession and possession with intent to deliver amounts between 51 and 649 grams ofcocaine. We disagree.

The duty of the trial judge is to instruct the jury regarding the law applicable to the case. MCL 768.2a MSA 28.1052; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Possession of a controlled substance is a cognate lesser included offense of possession with intent to deliver involving a differently categorized statutory amount. *Lucas, supra* at 581. A properly requested instruction for a cognate lesser included offense is required where two elements are satisfied. First, the principal offense and the lesser offense must be of the same class or category. Second, the evidence adduced at trial must be examined to determine whether that evidence would support a conviction on the lesser offense. *Hendricks*, supra at 444.

The evidence adduced at trial did not support a conviction of possession or possession with intent to deliver any amount less than 650 grams of cocaine. Two packages of cocaine were found together in defendant's van. The officer who found the cocaine recognized the packages as "kilogram level" packages. The larger of the two packages was eight inches long, seven inches wide,

and two inches thick. The contents of both packages tested positive for cocaine. The larger package weighed 1,011 grams. The smaller package weighed 498.9 grams. Moreover, the trial court instructed both as to possession and possession with intent to deliver 650 or more grams of cocaine. Looking at the jury instructions in their entirety, we hold that they fairly presented the issues to be tried and protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant further argues that the trial court abused its discretion by preventing him from testifying that he could not post his $5,000 bond. We disagree.

Evidence of poverty, dependence on welfare, or unemployment is not admissible to show motive or as evidence ofa witness' credibility. *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763(1986). It may, however, be admissible in some situations. Id. In the instant case, defendant was allowed to bring forth evidence of poverty to support his theory that he was too poor to be a large-scale drug dealer. Defendant and his living companion were five to seven payments behind on their land contract. Defendant's van had been repossessed for nonpayment. Defendant also called himself "destitute" and said he had no large sums of money stashed away. This evidence was sufficient to establish that defendant was poor. Evidence that defendant was incarcerated because he could not post his bond might have caused the jury to compromise its integrity and render a verdict based on factors other than the evidence. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). Where defendant was otherwise allowed to present evidence that he was poor, we hold that the trial court

did not abuse its discretion in excluding specific testimony that he could not afford to post bond. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant next argues that the trial court erred in failing to ask one of the jurors why she was crying while the verdict was read and the jury was polled. Defendant has not properly preserved this issue for appeal so we review it only for manifest injustice. *People v Lewis*, 98 Mich App 142, 144-145; 296 NW2d 209 (1980). We find no manifest injustice in this case. The juror in question was polled and, when asked if the verdict rendered was her verdict answered, "Yes." So did all the other jurors. The jury verdict was thus unanimous.

Defendant further argues that the trial court erred in failing to give defendant's requested instruction that "[i]t is the duty of the judge to impose the penalty required by law," instead of CJI2d 3.13, which states that the duty of the judge is "to fix the penalty within the limits of the law." We disagree.

The rule in Michigan has always been that neither the court nor counsel should address the question of the disposition of a defendant after the verdict. *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984). Indeed, it is proper for the court to instruct the jury that they are not to speculate upon such matters, and that they are to confine their deliberations to the issue of guilt or innocence. *Goad, supra* at 25-26.

The trial court's giving of CJI 2d 3.13 kept jurors from considering possible penalties in the instant case. Had the trial court given the instruction requested by

counsel the jury would have been alerted to the fact that only one, substantial penalty was available for defendant. This inference could have turned the jury away from considering only defendant's guilt or innocence. *Goad*, supra at 25-26. Moreover, we have held that it is error for the trial court to inform the jury that a defendant charged with possession with intent to deliver 650 or more grams of cocaine is subject to a mandatory life sentence if convicted as charged. *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989). Looking at the jury instructions in their entirety, we hold that they fairly presented the issues to be tried and protected the defendant's rights. *Daniel*, supra at 53.

Finally, defendant asks this Court to raise its voice in protest against the mandatory statutory penalty imposed on him, that of life in prison without possibility of parole. We decline this invitation. *People v Morris*, 450 Mich 316, 335-336; 537 NW2d 842 (1995); *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993).

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

Order

Michigan Supreme Court
Lansing. Michigan

Entered: November 7, 1997

108712

Conrad L. Mallett, Jr.
Chief Justice
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,
v
CHARLES JEFFREY ROSS,

Defendant-Appellant.

SC: 108712
COA: 186835
LC: 94-10665

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Taylor, J., not participating.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certifiy that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 7, 1997 /s/ Corbin R. Davis